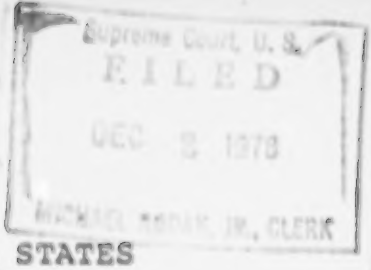


IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-884

JOHN FRANKLIN PUMPHREY, Petitioner

v.

STATE OF OREGON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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November 27, 1978

INDEX


| | Page |
|---|---|
| Opinion Below..... | 1 |
| Jurisdiction..... | 2 |
| Questions Presented.. | 2 |
| Constitutional Provisions involved... | 2,3 |
| Statement of the Case..... | 3,4,5,6, 7,8. |
| Reasons for granting the Writ..... | |
| 1. The Decision below conflicts with decisions of this court interpreting the factual basis to establish probable cause sufficient to support a search warrant..... | 8,9,10,11, 12,13. |
| 2. The Decision below necessarily interprets Oregon's implied consent statute in a manner which violates the Equal Protection of the Laws..... | 13,14,15. |
| Conclusion..... | 15. |

APPENDIX:

| | |
|---|---|
| Action by Court of Appeals..... | A-1,A-2. |
| Indictment..... | A-3,A-4 |
| ORS 163.118. Manslaughter in the First Degree..... | A-5 |
| Motion to Suppress and Affidavit..... | A-5,A-6, A-7. |

Page

Letter Opinion and Order Denying Motion to Suppress..... A-7,A-8, A-9,A-10.
Order..... A-11.
ORS 163.125. Manslaughter in the Second Degree..... A-12.
Oregon's Implied Consent Law..... A-12,A-13, A-14,A-15, A-16,A-17, A-18.
ORS 487.545. Use of Chemical Analysis to Show Intoxication.... A-18.

CITATIONS

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed 2d 723 (1964). 10
Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)..... 12
Loving v. Virginia, 388 U.S. 1, 11, 81 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)..... 14
McLaughlin v. Florida, 379 U.S. 184,196, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964)..... 14
Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973)..... 14

Page

Shapiro v. Thompson, 394 U.S. 618, 634, 98 S.Ct. 1322, 22 L. Ed.2d 600 (1968)..... 14
State v. Annen, 12 Or App 203, 206-209, 504 P2d 1400 (1973).. 13
State v. Kloucek, 17 Or App 74, 76, 520 P2d 458 (1974)..... 13
United States v. Ventresca, 380 U.S. 102, 108-109, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965)..... 12,13

STATUTES

ORS 19.180..... 1
ORS 163.118..... 7,A-5,A-7
ORS 163.125..... 7,A-12
ORS 487.545..... A-18
ORS 487.805..... A-12,A-13, A-14.
ORS 487.810..... A-14.
ORS 487.815..... A-15,A-16.
ORS 487.820..... 13, A-16.
ORS 487.825..... A-17
ORS 487.830..... A-17
ORS 487.835..... A-18

Amendment IV to the Constitution of the United States..... 2,3
Amendment XIV, §1 to the Constitution of the United States..... 3

Page

TREATISES

28 U.S.C., §1257(3).... 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

JOHN FRANKLIN PUMPHREY, Petitioner,

v.

STATE OF OREGON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

The Petitioner JOHN FRANKLIN PUMPHREY respectfully prays that a Writ of Certiorari issue to review the judgment without opinion of the Court of Appeals of the State of Oregon entered in this proceeding on March 1, 1978.

## OPINION BELOW

The Court of Appeals affirmed the judgment of the trial court without opinion, pursuant to Oregon Revised Statutes (hereinafter referred as ORS.) 19.180. A copy of the document reflecting such action appears in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1978. A timely Petition for Review was filed in the Supreme Court of the State of Oregon, such Petition being denied. A timely Petition for Rehearing was then filed, requesting the Supreme Court of the State of Oregon to reconsider its denial of the Petition for Review. Such Petition for Rehearing was denied on September 8, 1978, and this Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

(1) Whether probable cause for search may be established through an Affidavit which principally contains a conclusionary statement by a law enforcement official?

(2) Whether a state statute violates equal protection of the law when it allows persons accused of driving under the influence to refuse to submit to a blood test, while persons accused of other alcohol related crimes may not?

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the Constitution

of the United States:
AMENDMENT IV. Security from unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV to the Constitution of the United States, Section 1. Citizenship, privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On April 5, 1977 the Petitioner herein was involved in an automo-

bile-bicycle collision on a highway near Dallas, Oregon. The bicyclist was killed, and police officers at the scene, suspecting the Petitioner of being intoxicated, placed him under arrest.

After the Petitioner was in custody, the arresting officers and the District Attorney proceeded to procure a search warrant to take a blood sample from Mr. Pumphrey. In support of their request for such warrant, the District Attorney prepared an Affidavit which read as follows:

"On or about the 5th day of April, 1977, the District Attorney prepared the following Affidavit for Search Warrant:

I, John L. Snyder, being first duly sworn, on oath, depose and say:

That I am the duly elected qualified and acting District Attorney for Polk County, Oregon.

That on the 5th day of April, 1977, I investigated an accident that resulted in the death of a 17 year old boy that occurred on Old Oregon State Highway 22 near Rickreall, Polk County, Oregon, where the said 17 year old boy was struck, while riding a bicycle inside the fog line of the road by a motor vehicle driven by John Pumphrey.

That I have been informed by Randy Sitton, a State Police Officer, that he and State Police Officer Dean Gallino interviewed two eyewitnesses to the accident who stated that they observed the vehicle driven by John Pumphrey approach the victim's bicycle from the rear and suddenly swerve over the fog line and to the right striking the victim and throwing him a considerable distance. That both witnesses further stated that it appeared as if the movement of the vehicle was almost intentional.

That I observed the scene of the aforesaid accident and that it occurred on a long straight stretch of road and the visibility was excellent and there was no apparent reason for the accident.

That I have been informed that when the aforesaid State Police Officers talked to John Pumphrey at the scene of the accident they could smell the odor of intoxicants on his breath.

That I have known John Pumphrey for a number of years and that I observed him at the scene of the aforesaid accident and formed the opinion that he appeared to be under the influence of intoxicants to some degree.

That I have received infor-

mation from officers from various police agencies having jurisdiction in Polk County that John Pumphrey has used and trafficed in narcotic and dangerous drugs during the past several years.

That based upon the foregoing I believe that if blood were drawn from the body of the aforesaid John Pumphrey by a qualified medical person in a medical atmosphere and that if a urine sample were obtained from John Pumphrey under the same conditions that they would, upon analysis by a qualified person, constitute evidence of the crime of Negligent Homicide in violation of the Oregon Revised Statutes and thus make application to the court for a search warrant to obtain the same, by force if necessary."

This Affidavit resulted in the issuance of a search warrant, and the extraction of a blood sample from the Petitioner, despite his refusal to voluntarily submit to such test. After analysis, the blood showed an alcohol content of .09 per cent. Mr. Pumphrey was thereafter indicted[1] for

[1] The Indictment is set forth in the Appendix at A-3,A-4, A-5.

manslaughter in the first degree, a violation of ORS 163.118.[2]

Prior to trial, Petitioner filed a Motion to Suppress[3] the results of the blood test. A hearing was held based solely upon the original Affidavit of the District Attorney, the controverting Affidavit of the Petitioner, and legal arguments of counsel. The Motion to Suppress was denied.[4]

At Petitioner's subsequent trial the State introduced the results of the analysis of Petitioner's blood sample. Extrapolating from the figure, State experts testified that Mr. Pumphrey had a blood alcohol content of .09 - .15 per cent at the time of the fatal accident. The Petitioner was convicted of manslaughter in the second degree, a violation of ORS 163.125.[5]

2 ORS 163.118 is set forth in the Appendix at A-5.

3 The Motion to Suppress and attached Affidavit is set forth in the Appendix at A-5,A-6,A-7.

4 The letter opinion and Order of the trial judge is set forth in the Appendix at A-7,A-8,A-9,A-10, A-11.

5 ORS 163.125 is reproduced in the Appendix at A-12.

He thereafter appealed to the Court of Appeals of the State of Oregon and assigned as error the trial court's failure to suppress the results of the blood analysis. This argument was based both on the fact that the Affidavit in support of the search warrant did not properly establish probable cause, and that the State's failure to honor the Petitioner's refusal to submit to a blood analysis was violative of Constitutional concepts of equal protection. The Court of Appeals affirmed the conviction without opinion.

## REASONS FOR GRANTING THE WRIT

1. The Decision below conflicts with decisions of this court interpreting the factual basis to establish probable cause sufficient to support a search warrant.

Any analysis of the propriety of a search warrant requires a close examination of the factual composition of the supporting Affidavit. In this particular case such document contained the following:

"1) A statement by the affiant (John Snyder, Polk County District Attorney) that he had investigated an accident

involving the death of a 17 year old boy who had been struck by Defendant's car while riding his bicycle within the fog line.
2) A hearsay statement from Randy Sitton, a State Police Officer, that he and Officer Gallino had interviewed two unnamed eyewitnesses who saw Defendant's car suddenly swerve over the fog line and strike the victim.
3) A statement by the affiant that he observed that the accident occurred on a long straight stretch of road with excellent visibility and without apparent reason.
4) A hearsay statement from the police officers at the scene that they had talked to the Defendant and could smell the odor of intoxicants on his breath.
5) A statement by the affiant that he had known the Defendant a number of years, observed him at the scene, and formed the opinion that he appeared to be under the influence of intoxicants to some degree.
6) A statement by the affiant that he had received evidence from police agencies that the Defendant used and trafficked in dangerous drugs.
7) A statement by the affiant that if blood and urine samples were taken from the Defendant they would constitute evidence of negligent homicide."

These statements must be individually examined to accurately determine the credible evidence presented.

The first statement is a proper observation by the affiant.

The second statement is based on hearsay from unnamed eyewitnesses and must therefore pass scrutiny under the "two-pronged' test of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 723 (1964). The information passes the "basis of knowledge" prong, since the informants were eyewitnesses, but fails the "veracity" prong because of the complete lack of any facts bearing on their veracity. The evidence is therefore incompetent and can not be considered.

The third statement is another personal observation establishing the road conditions at the scene.

The fourth assertion is a hearsay statement passing the "two-pronged" test because it is a personal observation of the informant and he is a named police officer.

The fifth statement is an unsupported conclusion by the

affiant that he was of the opinion that the Petitioner was under the influence of intoxicants.[6]

The sixth statement is totally irrelevant, unsupported, and should not be considered.[7]

The seventh statement is irrelevant and conclusionary.

After properly excising incompetent portions of the Affidavit, it becomes apparent that it only states that there was an apparently unexplained fatal accident and the Petitioner had an odor of intoxicants on his breath. This is not "...reasonably trustworthy information sufficient...to warrant a man of reasonable caution in the belief that an offense has been or is being committed..." and

[6] It is important to note that the trial judge relied heavily on this conclusion of the District Attorney. (See letter opinion, Appendix at A- 7,A-8,A-9, A-10.

[7] Petitioner filed an Affidavit controverting this statement, and the trial judge found in his letter opinion that the information was irrelevant. (See Appendix at A- 7,A-8,A-9, A-10)

therefore insufficient to support a finding of probable cause. (Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed 1879 (1949)

Even more significant than the lack of competent factual evidence to support probable cause is the fact that the trial judge relied so heavily on the conclusion of the District Attorney. This type of conclusion, especially when made by a law enforcement official, is subject to criticism because it denies the magistrate the opportunity to examine the underlying facts in support of the affiant's belief. (United States v. Ventresca, 380 U.S. 102, 106, 108-109, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965) Countenancing such statement by the affiant indicates that the issuing magistrate can draw certain factual inferences from the District Attorney's conclusions, but such an inferential leap from conclusion to fact is exactly the opposite of what is permitted. The magistrate must instead have the facts from which he can infer his conclusion, not find facts from the conclusions of others.

Both the trial court, and by implication the Court of Appeals, accepted a conclusion

by the District Attorney as significant evidence of probable cause. Such reasoning is directly contrary to that in the Ventresca case, and runs counter to this court's basic interpretations of the Constitutional protection afforded by the Fourth Amendment.

2. The decision below necessarily interprets Oregon's implied consent statute in a manner which violates the Equal Protection of the Laws.

Even if there is sufficient probable cause to support the search warrant, there still remains a question of whether the Petitioner had a statutory right to refuse to have a blood sample taken under Oregon's Implied Consent Law. In this case the Petitioner refused to submit to such sample. Under prior Oregon authority this refusal should have been honored. (State v. Annen, 12 Or App 203, 206-209, 504 P2d 1400 (1973)) However, the Annen case was impliedly overruled by the passage of ORS 487.820[8], which apparently limits the right to refuse a blood alcohol test to driving under the influence cases. (State v. Kloucek, 17 Or App 74, 76, 520 P2d 458 (1974))

8 ORS 487.820, and the pertinent portions of the Implied Consent Law are set forth in the Appendix at A-16.

If so interpreted, the statute would discriminate between people accused of driving while intoxicated and those accused of other crimes involving the use of intoxicants, thereby violating the equal protection provisions of the Constitution. Since this protection of the implied consent law relates to one's Constitutional protection from unlawful searches and seizure, a "fundamental" right is involved, triggering the "strict scrutiny" standard. (Shapiro v. Thompson, 394 U.S. 618, 634 , 89 S.Ct. 1322, 22 L.Ed.2d 600 (1968) - See also Justice Harlan's dissent at 659; Roe v. Wade, 410 U.S. 113 93 S.Ct. 705, 35 L.Ed. 2d 147, (1973)) Under such test, there must be not only a "compelling state interest" for the classification, but also a showing that there are no viable alternatives to such discrimination. (McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 13 L.Ed. 2d 222 (1964); Loving v. Virginia, 388 U.S. 1, 11, 81 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967)) There is certainly no such interest present, since in all cases involving the use of alcohol, the State can rely on any and all evidence short of chemical analysis.

This issue is of significant importance because of similar conflicts that may arise in the

numerous jurisdictions with implied consent statutes. It is impermissibly discriminating to allow persons suspected of driving under the influence the protection of these laws, while those suspected of other crimes involving alcohol and driving are denied the same rights.

## CONCLUSION

For these reasons, a Wr t of Certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

By: DAVID W. HITTLE
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Salem, Oregon 97301

J. MICHAEL ALEXANDER
Brown, Burt & Swanson, P.C.
1005 Capitol Tower
Salem, Oregon 97301

Counsel for Petitioner

APPENDIX

ACTION BY COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Case Name:

State of Oregon, Respondent

v.

John Franklin Pumphrey, Appellant

| 9208 | 23988 | |
|---|---|---|
| CA No. | Court No. | Agency No. |
| Polk | H.W. Devlin | |
| County | Judge | Judicial Review |

Date argued 2/21/78 Date submitted on briefs ____

Before Schwab, Chief Judge, and Lee, Richardson and Joseph, Judges.*

| J. Michael Alexander | Appellant |
|---|---|
| Name | Attorney for |
| John L. Snyder | Respondent |
| Name | Attorney for |

Date affirmed from the bench and date filed _____

Date affirmed without opinion (ORS 19.180) and date filed ____ March 1, 1978

Date of Per Curiam opinion and
date filed _____

*Lee, J., did not participate.

OREGON SUPREME COURT

September 8, 1978

Case Title: STATE V. JOHN FRANKLIN PUMPHREY CA 9208

J. Michael Alexander
Attorney at Law

The Supreme Court has today denied appellant's Petition for Rehearing in the above-entitled matter.

cc - John L. Snyder

State Court Administrator

By s/ Marilyn Hartley
Marilyn Hartley
Calendar Clerk

INDICTMENT

JOHN FRANKLIN PUMPHREY is accused by the Grand Jury of the County of Polk and State of Oregon, by this Indictment of the crime of FIRST DEGREE MANSLAUGHTER, committed as follows:

JOHN FRANKLIN PUMPHREY, on or about the 5th day of April, 1977, in the County of Polk and State of Oregon, then and there being, did then and there, unlawfully, feloniously and recklessly under circumstances manifesting extreme indifference to the value of human life cause the death of another human being, to-wit: Darrell Dean Copeland, by:

a) Driving a motor vehicle while under the influence of intoxicating liquor to such a degree that his ability to operate a motor vehicle was adversely affected to a perceptible degree;

b) By driving a motor vehicle when he had .10 per cent or more by weight of alcohol in his blood;

c) By failing to maintain a proper lookout;

d) By failing to exercise the care and caution required to keep his venicle under control;

e) By driving a motor vehicle at a speed that was greater than reasonable and prudent;

f) By driving a motor vehicle on a roadway divided into two

clearly marked lanes and failing to drive entirely within a single lane until he made certain that such movement could be made with safety;

g) By driving a motor vehicle on a roadway and overtaking a vehicle traveling in the same direction, to-wit: a bicycle operated by Darrell Dean Copeland, and failing to pass said vehicle on the left at a safe distance;

h) By driving a motor vehicle upon a bicycle lane;

i) By driving a motor vehicle and failing to yield the right of way to a person, to-wit: Darrell Dean Copeland, a person operating a bicycle upon a bicycle lane;

said act of the defendant being contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated at Dallas, Oregon, in the County aforesaid this 12th day of April, 1977.

John L. Snyder
District Attorney

Witnesses subpoenaed and examined before the Grand Jury and for the State of Oregon:

William S. Lovell
Deand Gallino
Randle Sittion
Gordon Houser
Gary Houser
Richard Brown

Richard Manning
James Johnson
Gary A. Knowles (by report)

ORS 163.118. MANSLAUGHTER IN THE FIRST DEGREE. (1) Criminal homicide constitutes manslaughter in the first degree when:

(a) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) It is committed intentionally under circumstances not constituting murder.

(2) Manslaughter in the first degree is a Class A felony.

## MOTION TO SUPPRESS AND AFFIDAVIT

Comes now the Defendant JOHN FRANKLIN PUMPHREY, by and through his attorney CHARLES D. BURT, and moves the Court for an Order setting a time for an omnibus hearing pursuant to ORS 135.037 for the purposes of considering the following issues:

(a) Suppression of the chemical test results on vials of blood taken from the Defendant, based upon an invalid search warrant and without Defendant's consent, on or about April 5, 1977, said chemical analysis having been performed by the

Oregon State Police Crime Detection Laboratory.

(b) A motion to controvene, challenging the truthfulness and accuracy of the affiant, District Attorney John L. Snyder, presented in his Affidavit to Judge Walter Foster on April 5, 1977.

This Motion is supported by the Affidavit of Defendant, which is attached hereto, and by this reference incorporated herein.

Charles D. Burt
Of Attorneys for Defendant

AMENDED AFFIDAVIT

STATE OF OREGON )
: ss.
County of Marion )

I, JOHN FRANKLIN PUMPHREY, being first duly sworn, on oath, depose and say:

That I am the Defendant in the above captioned case. That I did not consent to taking of blood samples on or about April 5, 1977. That I have neither used or trafficed in narcotics or dangerous drugs during the past several years. That I have never been indicted, arrested, or convicted for using or trafficing narcotics or dangerous drugs.

This Affidavit is made in

support of my Motion to Suppress.

John Franklin Pumphrey

SUBSCRIBED AND SWORN to before me this 3rd day of June, 1977.

Donna R. Albus
Notary Public for Oregon
My Commission expires:
11/5/78

LETTER OPINION AND ORDER DENYING MOTION TO SUPPRESS

Please be advised that I have now had an opportunity to review the pleadings, and the memorandum submitted by Mr. McCann, and am now prepared to rule upon the demurrer and motions recently argued before the Court.

The demurrer of the defendant upon the ground and for the reason that the indictment is not definite and certain will be overruled. ORS 163.118 provides that criminal homicide constitutes manslaughter in the first degree when it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. That is the statute which the defendant has been charged with violating, and the language of the indictment is in those precise terms. In State v. Nussbaum, 261 Or 87, the Oregon Supreme Court held that an indictment

using words of a valid statute is generally sufficient. Again in State v. Johns, 20 Or App 259, the Court of Appeals held that an indictment is sufficient if it contains a statement of acts constituting the offense in ordinary and concise language in such a manner as to enable a person or common understanding to know what is intended.

The indictment alleges nine specifications constituting recklessness under circumstances manifesting extreme indifference to the value of human life, and such is a question of fact to be determined by the jury.

The specification of driving a motor vehicle when the defendant had a .10 per cent or more by weight of alcohol in his blood would be a circumstance, if established by the evidence, for the jury to consider, if not as a separate specification, under the allegation that the defendant was under the influence of intoxicants. The fact the specification of driving with .10 per cent or more may be duplicitous when there is an allegation that the defendant was driving under the influence such would not render the indictment subject to attack by demurrer. The elements of the crime are properly alleged in the indictment, and those, as earlier stated, are matters of evidence to be deter-

mined by the jury.

The motion to suppress the chemical test results of blood taken from the defendant without his consent will also be denied. I have examined the affidavit of Mr. Snyder, who executed the affidavit in his capacity as District Attorney for Polk County, and have concluded that there is sufficient relevant facts alleged in the affidavit to support a finding of probable cause. I agree with defense counsel that the affiant's statement as to the use and trafficking narcotic and dangerous drugs is immaterial and adds nothing to the finding of probable cause. However on the other hand, the affidavit recites generally that Mr. Snyder investigated the accident wherein the decedent was killed while riding his bicycle inside the fog line of the road by a motor vehicle driven by John Pumphrey. Mr. Snyder further recites that he was informed by two state police officers that they had talked to the defendant and they could smell the odor of intoxicants. The credibility of the police officers is established as a matter law. The distinguishing fact in this case from the Youngerman case, decided in 1975 by this Court, is that here the affiant recites that he has known John Pumphrey for a number of years and that he observed him

at the scene of the accident and that he, Mr. Snyder was of the opinion that Mr. Pumphrey was under the influence of intoxicants to some degree. In my opinion the affidavit sufficiently supports a finding of probable cause for the issuance of the search warrant.

The Legislature has seen fit to exclude the application of the implied consent law from prosecutions of criminal cases other than driving under the influence. I do not find ORS 487.820 to be violative of the equal protection or due process rights under the Oregon or United States Constitutions. I would think there is good reason for the Legislature to declare that the implied consent law is applicable to DUIL cases only, and results of tests inadmissible unless expressly consents, as opposed to manslaughter or criminally negligent homicide where the degree of crime is much greater and resulting in death of another.

An order may be prepared accordingly, and submit the original to me for my signature and filing.

Very truly yours,

Darrell J. Williams
Circuit Judge

ORDER

The above entitled matter came on regularly before the Court on the 1st day of July, 1977, the defendant appearing not at all but by and through his attorneys, Charles Burt and Don McCann and the plaintiff appearing by the District Attorney for Polk County, Oregon. the Honorable Darrell J. Williams presiding, this having been the time set for the hearing upon the defendant's motion to suppress certain evidence taken in connection with the above entitled matter and in particular the blood test taken pursuant to a search warrant.

The Court heard arguments of respective counsel concerning the motion to suppress and thereafter took the matter under advisement and on the 11th day of July, 1977, notified the parties of his decision by letter and the Court being fully advised in the premises:

IT IS, THEREFORE, ORDERED that the defendant's motion to suppress the blood test results taken pursuant to a search warrant shall be and is hereby denied.

Dated at Dallas, Oregon, this 18th day of July, 1977.

Darrell J. Williams
Circuit Court Judge

ORS 163.125. MANSLAUGHTER IN THE SECOND DEGREE. (1) Criminal homicide constitutes manslaughter in the second degree when:

(a) It is committed recklessly; or

(b) A person intentionally causes or aids another person to commit suicide.

(2) Manslaughter in the second degree is a Class B felony.

## OREGON'S IMPLIED CONSENT LAW

487.805. IMPLIED CONSENT TO CHEMICAL TEST; POLICE REPORT OF REFUSAL; EVIDENCE OF REFUSAL INADMISSIBLE. (1) Any person who operates a motor vehicle upon the highways of this state shall be deemed to have given consent, subject to ORS 487.805 to 487.815 and 487.825 to 487.835, to a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 487.540 or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicants in violation of ORS 487.540 or of a municipal ordinance.

(2) If a person under arrest for driving a motor vehicle whil under the influence of intoxicants in violation of ORS 487.540 or of a municipal ordinance, refuses tht request of a police officer to submit to a chemical test of his breath as provided in subsection (1) of this section, and if the person has been informed of the consequences of such refusal as provided by ORS 482.540 to 482.560 and of his rights as provided in ORS 487.810, no test shall be given, but the police officer shall prepare a sworn report of the refusal and cause it to be delivered to the division. The report shall disclose:

(a) Whether the person at the time he was requested to submit to a test was under arrest for driving a motor vehicle while under the influence of intoxicants in violation of ORS 487.540 or of a municipal ordinance;

(b) Whether the police officer had reasonable grounds to believe, at the time the request was made, that the person refusing to submit to the test had been driving under the influence of intoxicants in violation of ORS 487.540 or of a municipal ordinance;

(c) Whether the person refused to submit to a test;

(d) Whether such person was informed of the consequences, under ORS 482.540 to 482.560, of his refusal to submit to the test; and

(e) Whether such person was informed of his rights as provided in ORS 487.810.

(3) If a person under arrest refuses to submit to a chemical test of his breath under the provisions of subsection (2) of this section or refuses to consent to chemical tests as provided by ORS 487.835, evidence of his refusal shall not be admissible in any civil or criminal action, suit or proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle on the highways while under the influence of intoxicants.

487.810. CHEMICAL TEST AT REQUEST OF ARRESTED PERSON. In addition to a chemical test of the breath, blood, urine or saliva administered upon the request of a police officer a person arrested for driving a motor vehicle upon the highways of this state while under the influence of intoxicants shall be permitted upon request, at his own expense, reasonable opportunity to have any licensed physician and surgeon, licensed professional nurse or qualified technician, chemist or other qualified person of his own choosing administer a chemical test or tests for the purpose of determining the alcoholic content of his blood. The failure or inability to obtain such a test or tests by a person shall not preclude the admission of evidence

relating to a test taken upon the request of a police officer.

487.815. MANNER OF CONDUCTING CHEMICAL ANALYSES; DUTIES OF HEALTH DIVISION. (1) Chemical analyses of the person's breath, blood, urine or saliva, to be performed according to methods approved by the Health Division and by an individual possessing a valid permit to perform such analyses issued by the Health Division.

(2) The Health Division shall:

(a) Approve techniques or methods of performing chemical analyses that are satisfactory for determining alcoholic content of a person's blood.

(b) Prepare manuals and conduct courses throughout the state for the training of police officers in chemical analyses of a person's breath, which courses shall include, but are not limited to, approved methods and techniques of chemical analyses, use of approved equipment and interpretation of test results together with a written examination on these subjects.

(c) Test and certify the accuracy of equipment to be used by police officers for chemical analyses of a person's breath before regular use of such equipment and periodically thereafter at intervals of not more than 60 days, such tests and certification to be con-

ducted by trained technicians.

(d) Ascertain the qualifications and competence of individuals to conduct such analyses in accordance with one or more metholds or techniques approved by the board.

(e) Issue permits to individuals according to their qualifications. Permits shall be issued to police officers only upon satisfactory completion of the prescribed training course and written examination and the permit shall state the metholds and equipment which the police officer is qualified to use. Permits shall be subject to termination or revocation at the discretion of the Health Division.

487.820 IMPLIED CONSENT LAW NOT TO LIMIT INTRODUCTION OF EVIDENCE IN CERTAIN PROCEEDINGS. The provisions of the implied consent law, ORS 487.805 to 487.815, 487.825 to 487.835, except ORS 487.545 and subsection (3) of ORS 487.805, shall not be construed by any court to limit the introduction of otherwise competent, relevant evidence in any civil action, suit or proceedings or in any criminal action other than a violation of ORS 487.540 or a similar municipal ordinance in proceeding under ORS 482.540 to 482.560.

487.825. ADMINISTERING BLOOD TEST. In conducting a chemical test of the blood, only a duly licensed physician or a person acting under his direction or control may withdraw blood or pierce human tissue. A licensed physician, or a qualified person acting under his direction or control, shall not be held civilly liably for withdrawing any bodily substance, in a medically acceptable manner, at the request of a peace officer.

487.830. REPORTS OF CHEMICAL ANALYSES; EXPENSES OF CONDUCTING CHEMICAL TESTS. (1) An individual who performs a chemical analysis of breath, blood, urine or saliva under ORS 487.805 or 487.835 shall prepare and sign a written report of the findings of the test which shall include the identification of the police officer upon whose request the test was administered.
(2) Any individual having custody of the report mentioned in this section shall, upon request of the person tested, furnish that person or his attorney, a certified copy of the report.
(3) The expense of conducting a chemical test as provided by ORS 487.805 and 487.835 shall be paid by the governmental unit on whose equipment the test is conducted.

487.835. CHEMICAL TEST BY CONSENT OF ARRESTED PERSON. Nothing in ORS 487.805 is intended to, in lieu of a request for and administration of a breath test, preclude the administration of a chemical test of the blood, urine or saliva of any person if, when requested by a police officer, the person expressly consents to such a test.

487.545. USE OF CHEMICAL ANALYSIS TO SHOW INTOXICATION. (1) At the trial of any civil or criminal action, suit or proceeding arising out of the acts committed by a person driving a motor vehicle while under the influence of intoxicants, if the amount of alcohol in the person's blood at the time alleged is less than .10 percent by weight of alcohol as shown by chemical analysis of the person's breath, blood, urine or saliva, it is indirect evidence that may be used with other evidence, if any, to determine whether or not he was then under the influence of intoxicants.
(2) Not less than .10 percent by weight of alcohol in a person's blood constitutes being under the influence of intoxicating liquor.
(3) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

## CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to JOHN L. SNYDER, Polk County Courthouse, Dallas, Oregon 97338, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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